Nos. 11-393 and 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, et al.,
Respondents.

STATE OF FLORIDA, et al.,
Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS (SEVERABILITY)

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January 6, 2012

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INTEREST OF *AMICUS*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits this brief on the issue of severability and argues that the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("the Act") should be stricken in its entirety because the unconstitutional mandate is so integral to the legislative scheme that it should not be severed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

JFF has made numerous appearances as *amicus curiae* in this Court and several of the federal circuits, including the recent Fourth and Eleventh Circuit cases litigating the Act.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus curiae Justice and Freedom Fund concurs with the Eleventh Circuit decision holding that the Commerce Clause does not grant Congress authority to compel every American to purchase health insurance. The Necessary and Proper Clause cannot salvage the Act, because Congress itself created the financial "necessity" for the individual mandate—its centerpiece. The mandate is "necessary" but manifestly improper—it exceeds congressional powers under the Commerce Clause and jeopardizes the fundamental freedoms that Americans cherish.

But rather than sever the individual mandate, as the Eleventh Circuit did, this Court should strike the entire Act. Although such action may initially appear to be a greater intrusion into legislative territory, it actually preserves the separation of powers by not entangling the Court in the extensive rewriting necessary to ferret out the sections that can and cannot be sustained after the mandate is excised.

The normal presumption of severability should be abandoned in light of several key factors:

- Statutory language that unequivocally states the mandate is necessary;
- Warnings Congress received from its own legal counsel about potential constitutional flaws;
- Congress's deliberate removal of a severability clause included in an early draft of the Act.

The Florida District Court's thorough discussion of severability is the most helpful judicial analysis of the

issue in the lower courts. *Florida v. United States Dep't of Health & Human Servs.,* 780 F. Supp. 2d 1256, 1299-1305 (N.D. Fla. 2011) ("*Florida v. HHS*").

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN THE ENTIRE ACT IN ORDER TO PROTECT THE DOCTRINE OF SEPARATION OF POWERS AS MANDATED BY THE CONSTITUTION.

Severance is a matter of judicial restraint. *Florida v. HHS,* 780 F. Supp. 2d at 1299; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3161 (2010) ("*Free Enterprise Fund*"). Courts honor separation-of-powers principles by carefully severing flawed statutes while leaving the remainder intact. But if the court must carve up, rearrange, and rewrite too much, then it is best to invalidate the entire scheme. The Eleventh Circuit recognized these fundamental principles governing severability (*Florida v. HHS*, 648 F.3d 1235, 1321 (11th Cir. 2011) but failed to apply them correctly in this case.

Severability dates back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where this Court shaved one unconstitutional section from the Judiciary Act of 1789 and left the rest of the Act intact. C. Vered Jona, *Note: Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 Geo. Wash. L. Rev. 698, 701 (April 2008) ("*Cleaning Up*"); David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 661-62 (2008) ("*Judicial Lawmaking*"). Over the next few decades, this Court explained that severance is appropriate unless it

would disrupt legislative intent. *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the [C]onstitution...."); *Allen v. Louisiana*, 103 U.S. 80, 84 (1880) ("The point to be determined...is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.") Moreover, this Court began to warn against aggressive judicial revisions that effectively make new laws rather than enforcing old ones. *United States v. Reese*, 92 U.S. 214, 221 (1875); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922).

The "time-honored rule" now is "to sever with circumspection, severing any 'problematic portions while leaving the remainder intact.'" *Ayotte v. Planned Parenthood of New England,* 546 U.S. 320, 329 (2006) ("*Ayotte*"); *see also Free Enter. Fund*, 130 S. Ct. at 3161; *United States v. Booker,* 543 U.S. 220, 227-229 (2005); *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987) ("*Alaska Airlines*"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 591, 504 (1985); *Champlin Refining Co. v. Corp. Comm'n of Okla*., 286 U.S. 210, 234 (1932) ("*Champlin*"); *El Paso & Northeastern R. Co. v. Gutierrez,* 215 U.S. 87, 96 (1909). Severability must be considered against the backdrop of separation-of-powers principles. Legislative intent is part of the equation, but courts must cautiously consider how much rewriting is necessary to save the statute. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 688.

The general principle favoring severability "is not a rigid and inflexible rule," particularly in a novel case

like this one. *Florida v. HHS*, 780 F. Supp. 2d at 1299. The Act is invalid because it radically exceeds the powers of Congress and assaults the individual liberty that Americans treasure. But striking down *only* the individual mandate leaves the Act in shambles. Instead, this Court should eschew judicial rewriting and send Congress back to the drawing board with a clean slate.

A. This Court Cannot Conform The Act To The Constitution Without Performing Radical Surgery—A Quintessentially *Legislative* Function.

Severance is a remedial doctrine that shapes the contours of judicial relief after a court has found a statute unconstitutional in part. It requires courts to "restrain [themselves] from rewriting [a] law to conform it to constitutional requirements even as [they] strive to salvage it." *Ayotte,* 546 U.S. at 329-30, *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 397 (1988). Conventional wisdom suggests that striking down the entire Act would be "more of an intrusion than severing [its] invalid parts." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 672. But like a Presidential veto, total invalidation "functions like a remand" to Congress (*id*. at 673) and protects the separation of powers by "preserv[ing] [the] court's role as an adjudicatory rather than a legislature body." *Cleaning Up*, 76 Geo. Wash. L. Rev. at 712. Reconfiguring this massive, 2700-page Act would be "a far more serious invasion of the legislative domain" than any court should undertake. *Ayotte,* 546 U.S. at 329-330. Such a feat would be "tantamount to rewriting a statute in an attempt to salvage it" *Florida v. HHS*, 780 F. Supp. 2d 1256, 1304 (N.D. Fla.

2011), "enmeshing the judiciary in policy choices…better left to the legislative branch." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 643.

The Act is not a series of short statutes arranged together for convenience and thus easily severed or fine-tuned, but rather a "carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal." *Florida v. HHS*, 780 F. Supp. 2d at 1299. The invalid mandate is the glue that holds the Act together. "There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate" to be able to carve it out without doing violence to the entire scheme. *Id*. at 1304. The mandate is a legislative lynchpin, inextricably bound to the whole. Sometimes the connection is obvious—the limited religious exemptions, employer mandates, and coverage that must be included in a minimum benefits package. Other provisions may or may not hinge on the individual mandate. As Judge Vinson noted, e.g., it is impossible to know whether the Form 1099 reporting requirement [Act § 9006]—a revenue generating provision—would "stand independently of the insurance reforms." *Id*. The Act "must stand or fall as a single unit." *Id.* at 1305.

The Eleventh Circuit complains that the plaintiffs failed to cite "any modern case where the Supreme Court found a legislative act inseverable." *Florida v. HHS,* 648 F.3d at 1321, n. 136. Maybe the plaintiffs missed some of the case law, but it does exist—and so does clear precedent holding that courts should eschew judicial rewriting. Recently this Court declined to "blue-pencil" legislation, noting some possibilities but

leaving it to Congress to "pursue any of these options going forward." *Free Enterprise Fund,* 130 S. Ct. at 3162. This Court recognizes that it cannot "write words into [a] statute" or "leave gaping holes" or "foresee which of many different possible ways the legislature might respond to the constitutional objections" of a law it strikes down. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). In a pair of cases in the mid-1990's, "the Court declined to sever, reasoning that the legislature was the proper body to fix the respective statute's defects given the lack of a clear line in the statute to use for severance and the complexity of policy issues raised." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 647 n. 38, citing *Reno v. ACLU*, 521 U.S. 844 (1997) and *United States v. National Treasury Emps. Union*, 513 U.S. 454 (1995). In *National Treasury Employees Union*, this Court refused to craft a new "nexus requirement" when considering an honoraria ban applied to federal employees, finding that would involve "a far more serious invasion of the legislative domain" than the simple fix applied in *United States v. Grace*, 461 U.S. 171 (1983). *Id*. at 479 n. 26. In *Grace*, severance was an appropriate quick-fix that did not necessitate intrusive judicial rewriting or distort the statutory scheme. This Court struck down a ban on expression in the Supreme Court building and grounds, but only as applied to public sidewalks around the Court. *United States v. Grace*, 461 U.S. at 180-183. This was more efficient than requiring Congress to pass new legislation and it did not sacrifice the legislature's policy judgment. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 668.

A workable system of government is bound to create some overlap in the branches of government rather than a strict, inflexible separation. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 653; Paul M. Bator, *Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 265 (1990). But courts must avoid encroaching on legislative territory. "Severance should rarely, if ever, be employed if radical surgery is necessary to save a statute." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 689. Here, removal of the individual mandate would impermissibly entangle the Court in legislative alterations beyond the judicial domain.

B. The Presumption Of Severability Should Be Abandoned Because Congress Had Knowledge Of The Act's Constitutional Flaws.

Legislators take an oath to "support [the] Constitution." U.S. Const. art. VI. But in spite of this duty:

> Congress occasionally passes legislation that even supporters acknowledge poses serious constitutional concerns and presidents sometimes support legislation they believe to be constitutionally dubious, all because they sense that the courts are available as the ultimate arbiter of constitutional disputes.

Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 227, 277 (2004) (citing Joel Mowbray, The Bush Way of Compromise, Wash. Times, Apr. 12, 2002, at A23). Legislators are obligated to evaluate the constitutionality of proposed

legislation. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 586-587 (1975); *Cleaning Up*, 76 Geo. Wash. L. Rev. at 713.

This case is a striking example of legislators flouting their constitutional oath. Instead of examining the constitutional implications, this "2,700 page bill was rushed to the floor for a Christmas Eve vote." *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 789 (E.D. Va. 2010). Before the last-minute rush to legislate, several states passed laws declaring the mandate unconstitutional and exempting their own state residents from it. Congress' own attorneys "advised that the challenges might well have legal merit as it was 'unclear' if the individual mandate had 'solid constitutional foundation.'" *Florida v. HHS*, 780 F. Supp. 2d at 1301; *see* Jennifer Staman & Cynthia Brougher, Congressional Research Service, Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis, July 24, 2009, at 3, 6 ("whether Congress can use its Commerce Clause authority to require a person to buy a good or a service" raises a "novel issue" and "most challenging question");[2] *see also Commonwealth of Va.,* 728 F. Supp. 2d 768. A severability clause included in an early version of the Act was ultimately excluded. *Florida v. HHS*, 780 F. Supp. 2d at 1301. Thus there is strong evidence that Congress deliberately demanded inclusion of the controversial mandate—aware of its questionable constitutionality.

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[2] Available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

Under these circumstances, the normal presumption of severability should be turned on its head.

Severability is presumptively appropriate when a law is partly unconstitutional. This allows legislators to pass laws without being held to a standard of perfection, knowing that "courts will not throw out the baby with the bath water." *Cleaning Up*, 76 Geo. Wash. L. Rev. at 654. But sometimes inseverability is the norm: the Establishment Clause (an improper purpose permeates all of a statute's applications), the Free Speech Clause (chilling effects test), and Equal Protection (underinclusivity). *Id*. at 705 n. 42.

It makes sense to extend the presumption of inseverability to cases where Congress has purposely included a constitutionally defective statute in a legislative scheme. *Cleaning Up*, 76 Geo. Wash. L. Rev. at 700. A presumption of inseverability would discourage judicial redrafting. It would also "increase legislators' accountability for the constitutional ramifications of their actions" and encourage them to draft constitutional laws. *Id*.

This Court should "send the [Act] back to [Congress] to redraft and renegotiate a constitutionally sound law." *Cleaning Up*, 76 Geo. Wash. L. Rev. at 712. Congress—having abdicated its obligation to follow the Constitution—should not be able to rely on the courts to repair its defective handiwork. *Id*. at 713-714, citing Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 293 (1994).

II. THIS COURT SHOULD STRIKE DOWN THE ENTIRE ACT BECAUSE SEVERANCE WOULD THWART THE OBJECTIVES OF CONGRESS IN ENACTING IT.

When a court strikes down a statute as a remedial measure, it "frustrates the intent of the elected representatives of the people." *Ayotte,* 546 U.S. at 329-330. Courts use severance to avoid circumventing the legislature's intent. *Id*. But in this case, severance would frustrate that intent. Two District Courts correctly found the individual mandate unconstitutional, but the Virginia Court District, and the Eleventh Circuit on appeal from the Florida decision, left a shredded legislative scheme in place by failing to strike the entire Act.

Critical questions about legislative intent must be addressed:

- Would Congress have passed the Act without the individual mandate?
- Would Congress prefer a truncated Act—or no statute at all?
- If the mandate is severed:
    - Can the remaining provisions function independently and remain fully operative as law?
    - Would the remaining provisions still serve congressional intent, or would the purpose of the Act be defeated?

See Free Enterprise Fund, 130 S. Ct. at 3161-3162; *Booker*, 543 U.S. at 246; *New York v. United States*, 505 U.S. 144, 186 (1992); *Ayotte,* 546 U.S. at 330; *Alaska Airlines,* 480 U.S. at 684; *Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976); *Champlin,* 286 U.S. at 234; *Allen*, 103 U.S. at 83-84. The Eleventh Circuit acknowledges these critical inquiries (*Florida v. HHS*, 648 F.3d at 1324) but glossed over evidence that the mandate was the cornerstone of the entire Act.

A. It Is Virtually Certain That Congress Would Not Have Passed The Act Without The Individual Mandate.

Language in the Act itself exposes congressional intent: "The [individual mandate] is essential to creating effective health insurance markets...." Act § 1501(a)(2)(I). As the Florida Court observed in its analysis of the Necessary and Proper Clause, Congress actually created the financial "necessity" it now employs to justify the mandate:

> [R]ather than being used to implement or facilitate enforcement of the Act's insurance industry reforms, *the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself*. Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that *the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be*.

Florida v. HHS, 780 F. Supp. 2d at 1297 (emphasis added). The Government reasons that its Commerce Clause power to regulate and reform the health *insurance business* allows it to compel *individuals* to purchase policies from the insurance companies subject to the new regulations, in order to make the law financially viable and prevent economic catastrophe. This reasoning is flawed. The Government's warped application of the Necessary and Proper Clause converts it to the "hideous monster with devouring jaws" that Hamilton assured us it was not, rather than the "perfectly harmless" part of the Constitution he assured us it was. *Id*. at 1298, citing The Federal No. 33, at 204-205. But Congress's insistence on the necessity of the mandate, and its resort to the Necessary and Proper Clause, implies that the mandate is inseverable. Although constitutionally improper, it is integral to the statutory scheme.

Severance would be appropriate if the legislature's goals would still be served. *New York*, 505 U.S. at 187. A relatively unimportant, uncontroversial provision is normally severable. *Alaska Airlines,* 480 U.S. at 694 n. 18, 696 (duty-to-hire provisions severed from unconstitutional administrative regulations). But where the legislature clearly would *not* have enacted the leftover portions without a lynchpin provision, severance is improper.

In spite of overwhelming evidence, the Virginia District Court found this "element of the analysis...difficult to apply...given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote." The Court concluded that:

> It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to heath care, without Section 1501.
>
> [W]ithout the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

Commonwealth of Va., 728 F. Supp. 2d at 789.

This District Court's conclusion is strange in light of an avalanche of authority—including some of its own analysis. Recent decisions confirm the centrality of the individual mandate. *Id.* at 776 (The mandate is a "necessary measure to ensure the success of its larger reforms of the interstate health insurance market...without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to 'implode.'"); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 886 (E.D. Mich. 2010) (mandate is "[i]ntegral to the legislative effort" and an "essential part of this larger regulation of economic activity"); *Florida v. United States Dep't of Health and Human Servs.,* 716 F. Supp. 2d 1120, 1129 (N.D. Fla. 2010) ("[The mandate] is necessary...to meet 'a core objective of the Act'"); *Florida v. HHS*, 780 F. Supp. 2d at 1298 ("...individual mandate is absolutely 'necessary' and 'essential' for the Act to operate as it was intended by Congress"); *id*. at 1301 ("indisputably essential to what Congress was ultimately seeking to accomplish"); *id*. ("[T]he defendants have conceded that the Act's health

insurance reforms cannot survive without the individual mandate...."); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 633, 644-645 (W.D. Va. 2010) (mandate is essential to the Act); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,* 764 F. Supp. 2d 684, 687 (M.D. Pa. 2011) ("backbone provision").

However misguided the reasoning or constitutional analysis, congressional intent is clear: The mandate is mandatory—the Act unravels without it.

B. Even If The Remaining Provisions Could Function Independently—A Truncated Act Would Not Serve Congressional Purposes.

It is a closer question as to whether the remaining provisions could function independently:

> In a statute that is approximately 2,700 pages long and has several hundred sections—certain of which have only a remote and tangential connection to health care—it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate.

Florida v. HHS, 780 F. Supp. 2d at 1300. But the more critical inquiry is "whether these provisions will comprise a statute that will function 'in a manner consistent with the intent of Congress.'" *Id*., quoting *Alaska Airlines,* 480 U.S. at 685. A court must proceed cautiously, not "us[ing] its remedial powers to circumvent the intent of the legislature." *Ayotte,* 546 U.S. at 330, citing *Califano v. Westcott,* 443 U.S. 76, 94

(1979) (Powell, J., concurring in part and dissenting in part).

Sometimes a legislative scheme can survive judicial surgery and continue to serve the legislature's purposes. *Free Enterprise Fund,* 130 S. Ct. at 3161 (Sarbanes-Oxley Act remained fully operative without tenure restrictions); *Reno*, 521 U.S. at 882-883 (the overbroad Communications Decency Act of 1996 could be salvaged by striking the words "or indecent"); *Alaska Airlines,* 480 U.S. at 684 (legislative veto easily severed from substantive provisions); *Brockett*, 472 U.S. at 506-507 (court could sever portion of overbroad state law mandating penalties for individuals dealing in obscenity and prostitution); *Tilton v. Richardson,* 403 U.S. 672, 684 (1971) (20-year limitation on religious use restrictions violated the Establishment Clause but was not essential to the statutory program). In *New York v. United States*, this Court severed a punitive "take title" provision without doing violence to the rest of the legislative scheme, which included independent incentives for States to dispose of radioactive waste. *New York*, 505 U.S. at 186-187.

This case is different. The Florida District Court correctly held that:

> [A]ny statute that might conceivably be left over...would plainly not serve Congress' main purpose and primary objective in passing the Act [health care reform].... The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker.

Florida v. HHS, 780 F. Supp. 2d at 1304-1305. The Florida Court declined to undertake the massive task of sorting through the Act's myriad provisions in order to salvage it. Instead, the Court suggested that Congress "do a comprehensive examination of the Act and make a legislative determination as to which of its hundreds of provisions and sections will work as intended without the individual mandate, and which will not." *Id*. at 1305.

C. The Absence Of A Severability Clause Weighs Against Preserving The Remaining Provisions.

A severability clause—if the Act contained one—would signal an intention to make the Act divisible. *Champlin*, 286 U.S. at 235. But such a clause is not an "inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). It merely creates a "rebuttable presumption that 'eliminating invalid parts, the legislature would have been satisfied with what remained.'" *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring), quoting from *Champlin*, 286 U.S. at 235.

Severance, even on the legislature's cue, poses constitutional risks because it "enmeshes courts in what is quintessentially legislative policy work, and does so in a way that makes legislative correction unlikely after the fact." *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 687. Legislators may easily ignore constitutional norms in crafting laws, and courts may unwittingly create vague legal regimes in their efforts to salvage a partially unconstitutional scheme. *Id*. The line between the judicial and legislative branches may be dangerously thin.

On the other hand, the absence of a severability clause ordinarily "does not raise a presumption against severability." *Alaska Airlines,* 480 U.S. at 686; *New York*, 505 U.S. at 186. The omission does not necessarily "dictate the demise of the entire [Act]." *Tilton*, 403 U.S. at 684. The *Tilton* Court reasoned that:

> In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684.

The Act does not contain a severability clause. Although there is no presumption, the omission constitutes evidence that severability was not a priority on the minds of legislators and logically presents a stronger case against severability than would exist if the clause had been included. Although the Eleventh Circuit faulted the District Court for its "undue emphasis on the lack of a severability clause" (*Florida v. HHS*, 648 F.3d at 1322), there is even more persuasive evidence against severability: A severability clause was included in an earlier draft of the Act but ultimately removed. *Florida v. HHS*, 780 F. Supp. 2d at 1301. The individual mandate was controversial during the drafting of the Act, and challenges were on the horizon. *Id*. The Florida District Court action was filed just minutes after the President signed the Act. *Id*. at 1263.

Even if the Act did contain a severability clause, that would not settle the issue. This Court first limited the enforcement of a severability clause nearly a century ago, finding the valid provisions of the Future Trading Act were "so interwoven with those [unconstitutional] regulations that they [could] not be separated." *Hill*, 259 U.S. at 70; *Cleaning Up*, 76 Geo. Wash. L. Rev. at 702. The Act under consideration here is similar—hundreds of detailed interrelated provisions.

Neither the presence nor the absence of a severability clause conclusively dictates the outcome. *United States v. Jackson,* 390 U.S. 570, 585 n.27 (1968) ("[The] ultimate determination of severability will rarely turn on the presence or absence of such a clause.") But the complexity of the Act, the multitude of interwoven provisions, Congress's knowledge of the Act's constitutional flaws, and the intentional removal of a severability clause all reinforce the wisdom of remanding the entire scheme to Congress. In fact, if a severability clause were invoked "to salvage parts of a comprehensive, integrated statutory scheme, which parts, standing alone, are unworkable and in many aspects unfair, [that would] exalt a formula at the expense of the broad objectives of Congress." *Buckley*, 424 U.S. at 255 (Burger, C.J., dissenting). In the absence of such a clause, it is all the more appropriate to steer clear of dissecting this mammoth piece of legislation.

CONCLUSION

This Court should strike down the entire Act rather than to sever the individual mandate and uphold a truncated version that Congress surely would not have passed.

Respectfully Submitted,

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